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IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES
DEPARTMENT OF THE INTERIOR, *et al.*,

Petitioners,

v.

STATE OF SOUTH DAKOTA
AND
CITY OF OACOMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE TRIBE, THE PUEBLO OF LAGUNA AND THE PUEBLO OF SANTA ANA IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF THE JICARILLA APACHE TRIBE, THE PUEBLO OF LAGUNA AND THE PUEBLO OF SANTA ANA IN SUPPORT OF PETITIONERS

The Jicarilla Apache Tribe, the Pueblo of Laguna and the Pueblo of Santa Ana ("New Mexico Tribes" or "Tribes") respectfully submit this brief in support of the petition of the United States Department of the Interior, *et al.*, for a writ of certiorari to review the judgment of

the United States Court of Appeals for the Eighth Circuit in this case. The parties to this case have all consented to the New Mexico Tribes filing this brief, as indicated in letters filed with the Court.

INTEREST OF AMICI

The traditional lands of the Jicarilla Apache Tribe extended across nearly 50 million acres in New Mexico and Colorado.[1] The Tribe now is located on approximately 870,000 acres in north central New Mexico,[2] of which about 95,000 acres were taken into trust pursuant to Section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. §465.[3] The Tribe also has recently acquired a parcel of 32,069.8 acres, for which an application under Section 5 is currently pending.[4] The Pueblo of Laguna is comprised of six villages in the Rio San Jose Valley, west of Albuquerque.[5] The Pueblo was recognized through Spanish land grants in the late seventeenth century, but the land grants were not officially confirmed and patented by the United States until 1906, and there were still land disputes with non-Indian settlers after that time.[6] The Pueblo's land now consists of approximately

[1] Veronica E. Velarde Tiller, TILLER'S GUIDE TO INDIAN COUNTRY (1996), at 444.

[2] *Id.* at 443.

[3] The El Poso Ranch (26,421.38 acres) was placed in trust in 1986 and added to the Jicarilla Reservation in 1988; the Horse Lake Ranch (54,843.44 acres) was placed in trust and added to the reservation in 1988; and the Willow Creek Ranch (14,138,983 acres) was placed in trust in 1995 and is in the process of being added to the reservation.

[4] The Chama Land and Cattle Co. Property, purchased by the Tribe in July 1995.

[5] Tiller, *supra* note 1, at 446.

[6] *Id.* at 446-47.

530,000 acres, of which about 65,000 acres were taken into trust under Section 5 of the IRA.[7] The Pueblo of Santa Ana, which has a history similar to that of Laguna, is located just north of Albuquerque on approximately 60,000 acres,[8] of which about 400 acres were taken into trust pursuant to Section 5.[9] All of the land taken into trust under Section 5 was purchased with tribal funds, at no expense to the federal government.

All of the land purchased by the New Mexico Tribes and placed in trust under Section 5 of the IRA is regarded by the Tribes as part of their aboriginal territory. By having this land placed into trust the Tribes intended to safeguard against losing the land again in the future, precisely as contemplated by the IRA, and indeed as remarked upon by the dissent in the Eighth Circuit decision:

> Discontent with the allotment policy caused Congress to enact the Indian Reorganization Act of 1934, 25 U.S.C. §461-479, to stem the loss of Indian lands and to assist Indians in acquiring land

[7] The Majors Ranch (27,196.49 acres), placed in trust in 1976 and formally added to the Pueblo of Laguna Reservation in 1980; the Sanchez Ranch (8,848.16 acres), placed in trust and added to the reservation in 1981; the Eidson Ranch (6,898.72 acres), placed in trust in 1983 and added to the reservation in 1984; the Polocarpio Armijo Ranch (2,245.48 acres), placed in trust in 1983 and added to the reservation in 1984; and the Harrington Ranch (20,723.17 acres), placed in trust in 1987 and added to the reservation in 1988.

[8] Tiller, *supra* note 1, at 460.

[9] The Leonard Property (300.15 acres) was placed in trust in 1981 and added to the reservation in 1986; the First American tracts (132.008 acres) were placed in trust and added to the reservation in 1988; the Thompson tract (1.11 acres) and the Waters tract (2.50 acres) were placed in trust in 1994 but have not yet been added to the reservation.

> adequate for self-support. *See Chase v. McMasters*, 573 F.2d 1011, 1016 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978). The purpose of the Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S.Ct. 1267, 1272, 36 L.Ed.2d 114 (1973) (quoting H.R. Rep. No. 1804, 73d Cong. 2d Sess., 1 (1934)). The Act rejected assimilation as a goal and instead sought Indian self-determination. The portion of the Act under attack here, 25 U.S.C. §465, specificially addresses the problem of the loss of Indian land and authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians."

App. 20a-21a.[10] *See also Mescalero Apache Tribe*, 411 U.S. at 151 ("Unquestionably, the [IRA] reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands").

The Tribes also intended to ensure tribal sovereignty and jurisdiction over this land by having it taken into trust. *See, e.g., Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 511 (1991) (finding that tribal trust land was Indian country for purposes of tribal sovereign immunity). Moreover, this land has provided the Tribes with resources and opportunities for tribal employment, and has generated tribal revenues which have been used not for "wedding presents" for "tribal chieftains," App. 7a, but for sorely needed government services, also as contemplated by the IRA. *Mescalero Apache Tribe*, 411

[10] References to the Eighth Circuit's decision are cited to the appendix ("App.") of the United States' petition for a writ of certiorari ("U.S. Pet.").

U.S. at 151-52. After 60 years of land acquisitions under Section 5 of the IRA, the Eighth Circuit now finds the statute to be unconstitutional, based on a theory – the nondelegation doctrine – which this Court has not endorsed for 60 years. Unless this Court grants certiorari in this case, therefore, all of the Tribes' investment in Section 5 will be placed in jeopardy, by a decision which marks a radical departure from this court's established jurisprudence.[11]

SUMMARY OF ARGUMENT

As noted by the government in its petition, the IRA is one of the most important statutes affecting tribes, and Section 5 is one of the key provisions in the statute, U.S. Pet. at 15-16. Tribes, including the New Mexico Tribes, have used Section 5 to regain tribal lands and have developed these lands to provide tribal employment opportunities and revenue, which in turn strengthens tribal sovereignty and self-determination, thus achieving the goals of the statute. The Eighth Circuit's holding that Section 5 is unconstitutional, if followed by other courts, would put an end to this system without leaving any alternative in its place. Allowing the Eighth Circuit's decision to stand also would threaten the status of existing trust lands that have been acquired under Section 5; since these lands do not exist in isolation, moreover, but have been integrated into the rest of the tribes' lands, the adverse effects of the Eighth Circuit's decision would extend to entire reservations.

[11] The New Mexico Tribes do not make any concessions as to the precedential effect of the Eighth Circuit's decision, but recognize that states and other parties may rely on the decision to challenge both existing and pending trust acquisitions under Section 5.

The Eighth Circuit decision also is in direct conflict with decisions of this Court regarding the nondelegation doctrine. In construing Section 5, the Eighth Circuit failed to consider the provision in light of its legislative history, factual background and statutory and regulatory context. The court also failed to recognize the importance of allowing Congress flexibility in delegating legislative authority; such flexibility enables Congress to rely on administrative bodies to implement the details of its policies. In striking down the Section 5 delegation, which is no broader than many others upheld by this Court, the Eighth Circuit's decision represents a radical departure from established Supreme Court precedent. The Eighth Circuit also failed to abide by long-standing principles of statutory construction in reaching its decision.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S DECISION, IF ALLOWED TO STAND, WOULD HAVE ADVERSE IMPACTS ON TRIBAL SOVEREIGNTY, SELF-DETERMINATION AND ECONOMIC DEVELOPMENT.

From 1881, after the era of treaty making with Indian tribes, to 1934, the end of the allotment period, Indian lands decreased from approximately 156 million acres to 48 million acres.[12] This drastic diminishment of Indian lands was in large part the result of the federal government's allotment policies, which ended with passage of the IRA. *See* App. 20a. For the past 60 years, by proceeding under Section 5 of the IRA, Indian tribes

[12] Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.), at 138.

(including the New Mexico Tribes) have managed to regain some of their lost lands, and with them to strengthen tribal sovereignty and self-determination; it is this statute which the Eighth Circuit now finds unconstitutional.

Under Section 5 of the IRA, the Jicarilla Apache Tribe has acquired trust land which the Tribe uses to develop and conserve wildlife and range resources.[13] The wildlife management activities of the Tribe employ approximately 20 individuals on the reservation, including a wildlife biologist, technicians, enforcement personnel and park maintenance personnel. The Tribe also uses part of the land as a Youth Ranch to teach young tribal members about wildlife, soil and water conservation, farming and ranching; for example, the Tribe is conducting several grazing experiments through the Youth Ranch program to enhance the grazing resources within the reservation. The Tribe coordinates its wildlife management functions with its parks and recreation program in order to attract hunters, fishermen, and other tourists to the reservation. Hunting and tourism also support the operation of the Jicarilla Inn, a motel which is located on the reservation, owned by the Tribe, and managed and staffed by tribal members. The Tribe receives between $250,000 and $300,000 in revenue from its wildlife program each year. Part of the revenue is used to further develop the wildlife resources of the Tribe; the remainder helps fund tribal governmental services on the reservation. The

[13] The Jicarilla Apache Reservation was specifically identified as one of the allotted areas to be protected under the IRA. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., at 29 (1934).

Jicarilla Apache Tribe is also evaluating some Section 5 land for the development of homesites and grazing land for tribal members.

The Pueblo of Laguna uses virtually all of the land acquired under Section 5 for grazing, on which many of the Pueblo's members rely for their livelihood. The land also contains significant numbers of elk, deer, and antelope. The Pueblo has been developing a wildlife conservation program to enhance the number and quality of the game, and derives revenue from the game resources by selling hunting permits to members and non-members. The revenue generated from the hunting permits in part funds further conservation and game improvement activities of the Pueblo and in part funds other tribal governmental services provided on the reservation. In addition, the Pueblo currently is evaluating portions of its reacquired land for use as a commercial firewood enterprise and for lease for the construction of a cellular transmission tower, in an effort to provide additional revenues to the Pueblo.

The Pueblo of Santa Ana also uses part of its Section 5 land for grazing. In addition, part of the acquired land, along with land acquired through an act of Congress,[14] has been developed as a championship 27-hole golf course, which hosts several tournaments each month in addition to its daily operations. This golf course was not in existence at the time the Pueblo purchased the land, *see* App. 7a, but on the contrary was planned, designed and developed by the Pueblo in order to produce revenue and consequently services for the benefit of the Pueblo and its members. Other land that the Pueblo hopes to place into trust under Section 5 contains a four-star restaurant (again, planned and developed by the Pueblo) which is owned by the Pueblo and which,

[14] Act of Oct. 21, 1978, Pub. L. No. 95-498, 92 Stat. 1672.

together with the Pueblo's golf course, attracts patrons from nearby Albuquerque and provides revenue to the Pueblo.

Section 5 thus has been used by the New Mexico Tribes as a means of reacquiring land for their reservations, and in particular aboriginal land, precisely as Congress contemplated when enacting the IRA. Indeed, Section 5 is the only means, short of obtaining specific legislation, for Tribes to reacquire lost trust lands, since further treaty making was prohibited in 1871,[15] as was the establishment of reservations by executive order in 1919.[16] Cases brought in Claims Court are for money damages only.[17]

The land acquired by the Tribes under Section 5 has been incorporated into the Tribes' reservations, into their economic development plans and into their governmental structures. The Tribes have put this land to productive uses, such as hunting and grazing, have developed the land for recreation and tourism and have provided new opportunities for tribal businesses and employment, thus contributing to tribal self-sufficiency and improving economic conditions on the reservations. The resulting enhancement of tribal sovereignty and self-determination is a goal not only of the IRA but also one supported by

[15] Appropriations Act of March 3, 1871, 25 U.S.C. §71.

[16] Appropriations Act of June 30, 1919, 43 U.S.C. §150. *See also* 25 U.S.C. §§211, 398d.

[17] *See generally* Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753-854 (1992). A few eastern tribes have acquired land through land claim cases, based generally on the lack of federal consent to treaties with eastern states, but these are limited in number and were settled by specific legislation. *See* Robert N. Clinton *et al.*, AMERICAN INDIAN LAW (3d ed. 1991), at 738-40.

the President, *see, e.g.,* Memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments," 59 Fed. Reg. 22,951, as well as by presidents before him, *e.g.,* Statement by the President, 19 Weekly Comp. Pres. Doc. 98 (January 24, 1983), and by other acts of Congress, *e.g.,* Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450 *et seq.* *See also Mescalero Apache Tribe,* 411 U.S. at 152 (quoting H.R. Rep. No. 1804, 73d Cong. 2d Sess., 1 (1934)) (a major purpose of the IRA was to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism"). Moreover, because these Section 5 lands have been integrated into the Tribes' reservations, including into their regulatory, taxing and other governmental structures, disruptions to the status of these lands would not be confined to the individual parcels but would affect the reservation's life and economy as a whole.

Section 5 also provides a means for removing some of the "checkerboarding" on Indian reservations. Because of the allotment of tribal land, discussed above, and subsequent alienation of many tracts, much of Indian country has alternating areas of tribal trust land or other Indian land and private fee land. This checkerboarding of Indian land has created complex jurisdictional issues in many areas. *See, e.g., United States v. Calladitto,* 19 ILR 3057 (D.N.M. 1991) (criminal jurisdiction); *Oklahoma Tax Comm'n v. Sac and Fox Nation,* ___ U.S. ___ , 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993) (taxation); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989) (zoning). *See also* 56 Fed. Reg. 64,876, 64,878 (1991) (in which EPA notes its desire to avoid "a 'checkerboard'

system of regulation," with "the difficulties of assuring compliance with water quality standards when two different sovereign entities are establishing standards for the same small stream segments"). Consolidation of Indian lands through Section 5 helps to alleviate some of these problems.

Land is essential to the economic viability of tribes, which is all the more important at this time of decreases in the federal budget and cuts in federally funded tribal programs and the Bureau of Indian Affairs. In addition, loss of trust status would mean the imposition of a tax burden on tribes which could render uneconomic many of the uses of trust lands described above.[18] Tribes relied upon the trust status of Section 5 lands in developing these various uses of the land. Moreover, land acquired by the New Mexico Tribes under Section 5 comprises only 160,000 acres out of an estimated 9 million acres acquired in total under Section 5 during the past 60 years, U.S. Pet. at 17, all of which is placed in jeopardy by the Eighth Circuit decision.

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[18] Any concern as to the tax consequences to the state of removing land from state tax rolls was specifically addressed by Congress in enacting the IRA. In hearings before the Senate, the BIA pointed out that the recently enacted Johnson-O'Malley Act, 25 U.S.C. §452 (1934), established a system for reimbursing state and county governments for the cost of services they perform for Indians, in lieu of taxation. *To Grant Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S.2755 and S.3645 Before the Senate Committee on Indian Affairs,* 73d Cong., 2d Sess., at 160 (1934). In addition, §151.10(e) of the Department of the Interior's regulations under Section 5, 25 C.F.R. §151.10(e), requires the Secretary to consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls."

II.

THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT REGARDING THE NON-DELEGATION DOCTRINE AND MATTERS OF STATUTORY CONSTRUCTION AND JUDICIAL RESTRAINT.

This Court, in *Mistretta v. United States,* 488 U.S. 361, 372-73 (1989) (upholding delegation to set sentencing guidelines), set forth the three criteria for a delegation by Congress of legislative authority to be constitutional:

> this Court has deemed it "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." [Citing *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946).]

The Eighth Circuit found that Section 5 of the IRA did not satisfy the third requirement of this test because "there are no perceptible 'boundaries,' . . . within the four corners of the statutory language that constrain this delegated authority." App. 7a.

This finding pinpoints a major error in the panel's decision: the court should have looked beyond the "four corners of the statutory language" to the historical context and legislative history and purposes of the IRA as a whole to define the boundaries of the Section 5 delegation. *American Power & Light,* 329 U.S. at 104 (stating, in upholding SEC's authority to dissolve holding companies, "these standards need not be tested in isolation. They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear.").[19] The Eighth

[19] Section 5 itself provides more standards than the majority acknowledges: it specifies the rights that may be acquired ("any

[footnote continued]

Circuit's failure to look at the delegation in context thus marks a significant departure from Supreme Court precedent, *see also Mistretta,* 488 U.S. at 376, n.10; *Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 593 (1985); *Federal Energy Admin. v. Algonquin SNG, Inc.,* 426 U.S. 548, 560 (1976); *Lichter v. United States,* 334 U.S. 742, 785-86 (1948), as well as conflicting with case law in its own circuit, *United States v. Garfinkel,* 29 F.3d 451, 458 (1994) ("standards are not, however, examined in isolation. . . . Rather, we examine the language of the statute; the purpose of the Act, along with its factual background; and the statutory context in which the standards appear."). *See also City of Sault Ste. Marie v. Andrus,* 458 F.Supp. 465, 473 (1978) (dismissing claim that IRA is an unconstitutional delegation of legislative power, based in part on legislative history of Act providing adequate standards).

Moreover, this Court has upheld many statutes with broad delegations of legislative authority, as pointed out by Judge Murphy in her dissent from the Eighth Circuit decision, App. 18a. As the Court said in *Mistretta,* 488 U.S. at 373,

> Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations, see A.L.A. Schechter Poultry Corp. v. United

interest in lands, water rights, or surface rights to lands"); how they may be acquired ("through purchase, relinquishment, gift, exchange, or assignment"); and where they may be located ("within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased"). In addition, the Department of the Interior has promulated regulations which further define the scope of Section 5 authority. *See generally* 25 C.F.R. Part 51.

> States, . . . and Panama Refining Co. v. Ryan, . . . we have upheld, again without deviation, Congress' ability to delegate power under broad standards [citing numerous cases in which such delegations were upheld, and distinguishing *Schechter*, 295 U.S. 495, and *Panama Refining*, 293 U.S. 388].

(Citations omitted.) *See also Touby v. United States*, 500 U.S. 160, 165 (1991) (upholding expedited designations of controlled substances to avoid imminent hazards to public safety); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 219 (1989) (upholding authority of Transportation Secretary to establish pipeline safety user fees).

The Eighth Circuit's decision, if allowed to stand, would also restrict the ability of Congress to "seek[ ] assistance from another branch" in implementing its policies, *Hampton v. United States*, 276 U.S. 394, 406 (1928) (upholding flexible tariff provision), even though this Court has held that:

> "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function." . . . Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. . . . It is free to avoid the rigidity of such a system.

Yakus v. United States, 321 U.S. 414, 425-26 (1944) (upholding Emergency Price Control Act) (citations omitted). Indeed, this Court has specifically recognized "that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488

U.S. at 372. *Accord Touby*, 500 U.S. at 165; *Lichter*, 334 U.S. at 785; *Hampton*, 276 U.S. at 404-05. *See also Mistretta*, 488 U.S. at 377-79. As explained by the Court in *American Power & Light*, 329 U.S. at 105, "[t]he legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation." Our entire administrative system is based on an acknowledgement of the expertise and abilities of administrative bodies to address the details of implementing Congressional policies, which would be thwarted by the Eighth Circuit's decision.[20]

In addition, in reaching its decision the Eighth Circuit ignored certain basic principles of statutory construction and judicial restraint. At the same time as the court examined the boundaries placed on Section 5 within the narrowest confines of the statutory language, it construed the language of Section 5 itself as broadly as possible. App. 13a. This construction is in direct contravention of the long-established principle that statutes should be construed so as to avoid doubt as to their constitutionality. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986); *Garfinkel*, 29 F.3d at 455; *International Union, UAW v. OSHA*, 938 F.2d 1310, 1316 (D.C. Cir. 1991); *see also Mistretta*, 488 U.S. at 373 n.7. Moreover, it is a settled principle of Indian law that statutes are to be construed in favor of the Indians. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973). Furthermore, as Judge Murphy

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[20] *See generally* Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE (3d ed. 1994), §2.6.

pointed out in dissent, App. 15a-16a (citing *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984)), the Eighth Circuit unnecessarily reached a constitutional issue rather than addressing a jurisdictional issue, regarding the availability of judicial review under the Administrative Procedure Act, 5 U.S.C. §§701-706.

Finally, as the federal government has discussed in its petition, the Department of the Interior has promulgated a regulation providing an opportunity for judicial review before land is actually taken into trust under Section 5, 61 Fed. Reg. 18,082 (1996), reprinted at App. 64a-69a. In fact, the Jicarilla Apache Tribe currently has a Section 5 application pending under the Department's new rule (*see* note 4, *supra*). The availability of judicial review has a bearing on the constitutionality of a delegation, *Skinner v. Mid-America Pipeline*, 490 U.S. at 219 (citing *American Power & Light*, 329 U.S. at 105); *Garfinkel*, 29 F.3d at 459; App. 17a, and the Department's rule is yet one more factor weighing in favor of the constitutionality of Section 5.

CONCLUSION

For all the above reasons, the Court should grant the Department of Interior's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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